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STATE OF CALIFORNIA

Energy Resources
Conservation and Development Commission

In the Matter of:

Application for Certification for the
Tesla Power Project

DOCKET NO. 01 AFC-21

**MIDWAY POWER, LLC REPLY
BRIEF TO INTERVENORS'
PETITIONS FOR
RECONSIDERATION**

INTRODUCTION

Midway Power, LLC (Midway) hereby files its Reply Brief to Intervenor's Petitions for Reconsideration in accordance with the Commission Order dated July 19, 2004. Since Intervenor Sarvey and CARE raise similar issues in the respective petitions, one reply brief has been prepared for both petitions.

As set forth below, none of the arguments raised by the Intervenor's are new. The Intervenor's participated extensively in the licensing process, attending workshops, filing documents, presenting evidence, cross-examining witnesses, and providing comments on the Commission documents. In fact, each of the arguments presented in the petitions was considered and decided by the Siting Committee and the full Commission. Intervenor's petitions merely attempt to "re-litigate" contested issues, which were not decided in their favor. In order for the Intervenor's to prevail on their petitions, they must "set forth with specificity the grounds for reconsideration, addressing any error in fact or

law.”¹ Intervenor has merely restated the arguments previously rejected by the Siting Committee and the full Commission. The Commission should deny the petitions on the basis that

1. Each and every argument contained in the petitions was addressed by the licensing process and a Decision rendered;
2. The evidentiary record supports the Commission Findings that the Tesla Power Project will not result in significant environmental impacts and will comply with all applicable laws, ordinances regulations and standards (LORS); and
3. The Intervenor presents no errors of fact or law that would justify granting of the petitions.

Each of Intervenor’s arguments is addressed below.

ARGUMENT

CARE’s Request for Rebuttal Evidence

CARE requests additional evidentiary hearings to “set the record straight” by producing rebuttal evidence to Staff’s filing of June 15, 2004. The Commission should deny CARE’s request because:

1. The entire issue of whether Staff’s filing was relied upon by the Commission in reaching its Decision was addressed at the Business Meeting when the document was excluded from the Commission deliberations; and
2. CARE’s argument is irrelevant since the filing was Staff’s rebuttal argument against the recommendations set forth by Mr. Sarvey in his comments on the Revised Presiding Members Proposed Decision (RPMPD). Such argument is

¹ Title 20 CCR §1720 (c)

not evidence and therefore, could have been presented orally by Staff at the Business Meeting.

On June 15, 2004, Staff filed a "Response to Intervener Sarvey's Motion to Delay Certification and Comments on the Revised PMPD". Mr. Sarvey contended at the June 16, 2004 Business Meeting that Staff's filing was procedurally defective because it was filed after the parties' comments on the RPMPD were due. CARE concedes in its petition that, "The Commission appropriately struck Staff's eleventh-hour submission from the record."² Therefore, the Commission granted relief to Intervenor Sarvey by striking that portion of Staff's document that provides a rebuttal to Mr. Sarvey's comments on the RPMPD.

Since the document was stricken from the record, there is no "evidence" to which CARE is entitled to provide rebuttal evidence. CARE's request for the opportunity to present additional rebuttal evidence should be denied.

Air Quality Emissions Transport and ERC Effectiveness

Both Intervenors CARE and Sarvey again declare their disagreement with the air quality experts in the field regarding the complex subject of emissions transport between the Bay Area and the San Joaquin Valley. While we understand the confusion that can be created by such a complex matter, the Intervenors' arguments contained in the petitions are misleading. First, the Commission Decision sets forth a summary of all of the evidence presented on this topic at evidentiary hearings and in the parties' briefs. Second, the Commission Decision sets forth a rationale for its concurrence with Staff's approach. Third, the Commission Decision provides the **more extensive** mitigation for potential impacts to San Joaquin Valley than was imposed on the East Altamont Energy Center and the Tracy Peaker Project, which are both closer to Tracy. In fact, the Commission Decision imposes significantly more emission reduction requirements and

² Page 1, CARE's Petition for Reconsideration, dated July 14, 2004.

a requirement for reduced operations that are in excess of the mitigation that the San Joaquin Valley Air Pollution Control District (SJVAPCD) calculated was appropriate to mitigate all of the Tesla Project's impacts to its region.

CARE and Sarvey simply do not support the result reached by the Commission in its Decision but fail to identify any error of fact or law upon which the Commission Decision is based. After considering all of the evidence submitted by Mr. Sarvey, CARE, Midway, Staff and comments from the public, the Commission Decision is supported by the evidence in the record. The Siting Committee included a discussion at pages 157 and 158 of the Decision specifically addressing Mr. Sarvey's argument that the transport and ERC effectiveness should be different than proposed by Staff. Midway argued that the Siting Committee should also follow the East Altamont Energy Center approach, which relied solely on the determination of the SJVAPCD's of the appropriate amount of mitigation. However, the Committee distinguished Tesla and the East Altamont Energy Center in Footnote 45 to the Decision, stating that the evidentiary record in the Tesla proceeding supported rejecting the SJVAPCD's mitigation calculation in favor of Staff's approach.³

Midway finds Intervenor's arguments against the Committee approach perplexing since the Committee approach results in the most mitigation for any project in the region, including the first-ever imposed PM_{2.5} mitigation requirement. Intervenor Sarvey's contention that the EPA announced that the San Joaquin Valley is in non-attainment for PM_{2.5} is irrelevant because the Committee assumed that the San Joaquin Valley would be designated non-attainment for PM_{2.5} and agreed with Staff's approach which reduced the effectiveness of Midway's PM₁₀ offsets by over 85 percent to account for only that portion that would effectively mitigate PM_{2.5}.⁴

³ Commission Decision, Tesla Power Project, page 158.

⁴ Commission Decision, Tesla Power Project, pages 143;155; and 158.

The Intervenor's arguments are contradictory, since they contend on the one hand that the Commission should follow the East Altamont Energy Center approach in rejecting Staff's methodology but on the other hand should not reach the same result concerning the amount of mitigation.

Lastly, not only did the Siting Committee consider the very same argument concerning the transport effects in San Joaquin Valley at evidentiary hearings, Mr. Sarvey made the very same argument at the full Commission Business Meeting on June 16, 2004. After hearing from Mr. Sarvey, CARE, Staff and Midway, the Commission unanimously denied Mr. Sarvey's motion to delay certification based on inadequate mitigation as determined by transport of emissions from the Bay Area to San Joaquin Valley.⁵

Because neither Sarvey nor CARE identify errors in fact or law, the Commission should deny the Intervenor's petition for reconsideration to re-examine the air quality transport and ERC effectiveness issue.

CO Mitigation

CARE disagrees with the Bay Area Air Quality Management District (BAAQMD) determination that Best Available Control Technology (BACT) for CO is 4 ppm. Staff correctly points out that a BACT determination is the responsibility of the local air district and US EPA as part of its New Source Review under the Clean Air Act. Unless there is an impact that would require reduction of CO as mitigation, Staff's determination is solely whether the CO emission limits will comply with applicable LORS. Staff routinely, and correctly, relies on the BAAQMD and US EPA, the agencies who implement the standard in question. Staff determined that the CO emissions would not result in a significant impact, which may require mitigation⁶. Therefore, reduction of CO emissions is not necessary or required.

⁵ 6/16/04 Business Meeting, RT pages 5-18

CARE has not presented any demonstration that the CO emission limit is based on an error in fact or law and therefore, the petition should be denied.

Ammonia Slip

Intervenor Sarvey introduced evidence and made arguments that the project should reduce its ammonia slip emissions to 2 ppm. The Committee considered that evidence along with evidence presented by Midway and Staff and ultimately concluded that the ammonia slip of 5 ppm proposed by Midway and recommended by Staff was the lowest reasonable rate.⁷ CARE contends in its petition that the limit should be 2 ppm for the same reasons presented by Mr. Sarvey at evidentiary hearing. Since CARE's petition does not raise any new arguments or present any demonstration that the Decision is based on an error of any fact or law, the petition should be denied.

Additionally, the Commission should recognize that the East Altamont Energy Center and the Walnut Energy Center were approved by the Commission with ammonia slip limits of 10 ppm.⁸

Cumulative Air Quality Impact Analysis

Intervenor Sarvey continues to argue that Staff should perform *his* version of a cumulative air quality impact analysis. The Committee considered this argument at evidentiary hearings and allowed Mr. Sarvey to cross-examine Staff on their cumulative air quality impact methodology. The Commission Decision includes reasoning why it did not direct Staff to perform the Sarvey method at pages 161-164 and properly concluded that Mr. Sarvey's arguments were not supported by either Staff or Midway and were unpersuasive. In addition, the Commission Decision, at page 164 correctly concludes that the TPP is required "to mitigate the TPP's *contribution* to significant

⁶ Commission Decision, Tesla Power Project, page 143; Ex. 51, page 4.1-31.

⁷ Ibid, Finding 16, page 166

⁸ Commission Decision, East Altamont Energy Center, page 149; Commission Decision, Walnut Energy Center, page 103.

cumulative impacts, not to mitigate the impacts of all foreseeable projects". TPP is mitigating for *all* of its emissions and therefore will not contribute anything to the region.

Therefore, the Commission should deny the petition for reconsideration because it fails to establish factual errors upon which the Commission relied.

Cumulative Health Risk Assessment for PM_{2.5}

CARE argues in its petition that a Cumulative Health Risk Assessment for PM_{2.5} Impacts should be performed. This request is based on a fundamental misunderstanding of how Staff conducts its analysis. Staff has explained that the effects of air emissions are contained in two separate sections of its Final Staff Analysis. The Air Quality section analyzes the effects of the emissions of criteria pollutants and the Public Health section analyzes the effects of all other emissions and pollutants that could possibly affect the general public. Particulate Matter (both PM₁₀ and PM_{2.5}) is considered by Staff in the Air Quality section of its analysis as a criteria pollutant. Staff compares the effects of the emissions from the project to established air quality standards. Those air quality standards are set by the air quality regulatory agencies taking into account effects on public health. Staff concluded and the Commission Decision agreed that the TPP should mitigate for PM_{2.5} emissions. This conclusion was based on potential effects on public health. To our knowledge, no other project has been required by the Commission to mitigate for PM_{2.5} emissions in this fashion.

Therefore, CARE's petition for reconsideration should be denied on these grounds.

Alameda County Williamson Act Cancellation

Intervenors' Sarvey and CARE presented testimony and a witness at the evidentiary hearings relating to Alameda County's cancellation of the Williamson Act. The basis upon which the Intervenors object to the cancellation is that they allege the cancellation

would violate Measure D and Policy 86 of Alameda County's East County Area Plan (ECAP). The Intervenor's witness also testified at the Alameda County Board of Supervisor's hearing against the cancellation on the same grounds. Alameda County heard that testimony, rejected it, made the appropriate findings and approved the cancellation. The Committee heard the same testimony, which is discussed at length at pages 377-383 of the Decision. At pages 381 and 382 of the Decision, the Commission states:

We typically give due deference to a public agency's interpretation of its own land use LORS unless that interpretation conflicts with the Commission's siting authority or would cause the Commission to rely on factual error (Ex. 51, p. 4.5-13; See Cal. Code Regs., titl. 20 §1714.5(b).) We neither have jurisdiction nor good cause to second guess the official action of the County Board of Supervisors in this case. The Board of Supervisors is the land use agency that represents County voters. Given the Board's action, we conclude that the Project is consistent with the overall policy intent of ECAP/Measure D Policy 86.

The Intervenor has failed to establish an error of law or fact relied on by the Commission. They simply disagree with Alameda County's position because they oppose the project. This is not a basis for granting reconsideration and the Commission should deny the petitions.

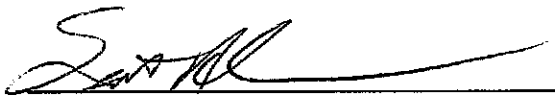
CONCLUSION

The licensing process for the TPP was extremely thorough and long, allowing ample opportunity for the Intervenor to participate. CARE and Sarvey exercised every opportunity to participate and in some instances were granted additional time to participate. The Intervenor raised each and every argument presented in these petitions more than once. The licensing process should have a finite end. For the

reasons discussed in this Reply Brief, Midway respectfully requests the Commission declare the licensing process of the TPP complete by denying the petitions for reconsideration.

Dated: August 5, 2004

Respectfully submitted,

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Scott A. Galati
Counsel to Midway Power, LLC

STATE OF CALIFORNIA

State Energy Resources
Conservation and Development Commission

In the Matter of:

Docket No. 01-AFC-21

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By Midway Power LLC

PROOF OF SERVICE

I, Carole Phelps, declare that on August 5, 2004, I deposited copies of the attached **Applicant's Reply Brief to Intervenors' Petitions for Reconsideration, for the Tesla Power Project** with first class postage thereon fully prepaid and addressed to the following:

DOCKET UNIT

I have sent the original signed document plus the required 12 copies to the address below:

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I have also sent individual copies to:

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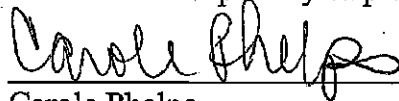
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I declare under penalty of perjury that the foregoing is true and correct.

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Carole Phelps